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No. 89-679

In the Supreme Court of the United States

OCTOBER TERM, 1989

DANIEL BELL, ET AL., PETITIONERS

v.

DICK THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of employees of the Justice Department who hold top secret security clearances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-37a) is reported at 878 F.2d 484. The opinion of the district court (Pet. App. 38a-49a) is reported at 690 F. Supp. 65.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1989. A petition for rehearing and a suggestion for rehearing en banc were denied on September 1, 1989. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 25, 1987, after more than a year of study, the Department of Justice announced its Drug-Free Workplace Plan. Pet. App. 70a-104a. To prevent illegal drug use by the Department's workforce, while at the same time assuring that employees' "personal dignity and privacy [would] be respected" (*id.* at 73a), the Plan established a comprehensive program whose elements include (1) employee assistance in obtaining treatment and counseling for drug abuse problems; (2) supervisory training in detecting and dealing with drug problems; (3) employee education on the dangers of illegal drugs; and (4) identification of illegal drug use through drug testing. *Ibid.*

On December 15, 1987, the Department issued its Drug-Free Workplace Plan for its Offices, Boards, and Litigating Divisions ("OBD Plan"). Pet. App. 105a-127a.[1] The OBD Plan authorizes random urinalysis drug testing of five categories of employees in sensitive positions: (1) employees who have top secret security clearances; (2) attorneys responsible for conducting grand jury proceedings and personnel who assist them; (3) incumbents serving under Presidential appointments; (4) attorneys whose duties include the prosecution of criminal cases; and (5) attorneys and other employees

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[1] The Department components that are included in the OBD Plan are listed at Pet. App. 105a-106a. Several Department components have separate drug programs, and thus are not included in the OBD Plan. Those components include the Immigration and Naturalization Service, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Prisons.

whose duties include maintaining, storing, or safeguarding a controlled substance. *Id.* at 111a. The OBD Plan's procedures for sample collection and urinalysis testing conform to the requirements prescribed by the Department of Health and Human Services for all federal employee drug-testing programs. *Id.* at 115a-116a. These procedures were before this Court in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384, 1388-1389, 1394 n.2 (1989).

2. Petitioners are ten Department of Justice attorneys who hold top secret national security clearances and thus are subject to random testing under the OBD Plan. See Pet. 2-3. Along with 32 other Department employees, petitioners commenced this action seeking, inter alia, an injunction prohibiting the Department from implementing drug testing under the OBD Plan. The district court granted petitioners' motion for a preliminary injunction, and enjoined the Department from "implementing mandatory random testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice." Pet. App. 50a. On respondents' application, the district court entered an order making that injunction permanent. *Id.* at 52a.

3. After this Court denied petitioners' petition for certiorari before judgment, *Harmon* v. *Thornburgh*, 109 S. Ct. 328 (1988), the court of appeals affirmed in part, reversed in part, and remanded to the district court for further proceedings. Pet. App. 3a-37a.[2]

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[2] In a separate order entered the day after oral argument in the court of appeals, the court dissolved the district court's injunction with respect to Presidential appointees and employees whose duties include the storing, maintaining, or safeguarding of a controlled substance. The court found that none of the

The court of appeals noted (Pet. App. 8a) that its disposition of the case was "guided–and to a large extent, controlled–by" this Court's recent decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989). After outlining the principles recognized in those cases, the court rejected two "basic distinctions" that petitioners sought to draw between *Von Raab* and this case. First, the court found that the fact that Justice Department employees work in traditional office environments–though it is an "element to be weighed in the balance"–is not "of overriding significance." Pet. App. 11a. Second, the court determined that the fact that the program provides for random testing, while "relevant," does not require "a fundamentally different analysis from that pursued by [this Court] in *Von Raab*." *Id.* at 12a.

The court of appeals then applied the approach of *Von Raab* and *Skinner*–which balances the individual's expectation of privacy against the government's interests in a testing program–to each of the interests advanced by the government to justify drug testing under the OBD Plan. The court ruled that the government's interests in preserving the integrity of its employees and in protecting public safety do not justify random drug testing of any of the categories of employees earmarked for testing. Pet. App. 13a-16a.[3]

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plaintiffs fell within those categories and thus that petitioners and their co-plaintiffs lacked standing to challenge those aspects of the program. Pet. App. 7a-8a.

[3] The panel majority indicated that it was "quite possible" that the government's interest in the integrity of its employees would

The court concluded, however, that the government's interest in protecting "'sensitive' information" justifies random testing of employees holding top secret national security clearances. Noting that in *Von Raab* this Court held that "the Government has a compelling interest in protecting truly sensitive information," the court of appeals agreed with the government that "[w]hatever 'truly sensitive' information includes, * * * it encompasses top secret national security information" (*id.* at 17a). The court of appeals held, accordingly, that "the government's interest in protecting [top secret national security] materials outweighs the employees' privacy interest, despite the fact that the OBD testing program is somewhat more intrusive than the plan upheld in *Von Raab*." *Id.* at 18a.[4]

ARGUMENT

The court of appeals' holding that the Fourth Amendment permits random drug testing of Department of Justice employees holding top secret national secur-

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justify testing of "all DOJ employees having substantial responsibility for the prosecution of federal drug offenders," but it declined to lift the injunction covering such employees because the Department had not fashioned a drug testing program limited to them. Pet. App. 15a & n.10, 19a-26a. Judge Silberman dissented from this aspect of the court's opinion. In his view, the Fourth Amendment permits testing of employees who participate in prosecuting drug-related cases, and he would have dissolved the district court's injunction to that extent. *Id.* at 28a-37a.

[4] The court found the government's interest in protecting sensitive information insufficient, however, to justify random testing of criminal prosecutors and employees with access to grand jury secrets. Pet. App. 18a-19a.

ity clearances is faithful to the general principles outlined in *Von Raab* and *Skinner*, and does not conflict with the decisions of any other court of appeals. Contrary to petitioners' contention, the fact that the program at issue provides for *random* testing does not render it suspect. On that point, the court's conclusion is consistent with decisions from five other circuits that have upheld programs having that same feature. Petitioners' assertions that the court of appeals misapplied *Von Raab* and *Skinner* in various respects are also without merit, and, in any event, those contentions do not raise questions of general importance. Further review is therefore not warranted.

1. Petitioners' principal contention is that there are "profound" differences between programs that provide for universal testing of a category of employees and random testing programs. Pet. 6; see *id.* at 6-16. In their view, the principles of *Von Raab* and *Skinner* should not be "extended" (*id.* at 6, 8) to random testing programs. However, to date, six circuits, including the D.C. Circuit in this case and in two other cases,[5] have upheld random urinalysis drug testing programs against Fourth Amendment challenges. *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.), cert.

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[5] *National Federation of Federal Employees* v. *Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (upholding random testing for drug counsellors and other civilian employees of Department of the Army, and striking down random testing for Army civilian employees working in drug testing laboratories), petition for cert. pending, No. 89-635; *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (upholding random testing of Department of Transportation employees holding safety-sensitive jobs, including aircraft mechanics and safety inspectors).

denied, No. 89-205 (Nov. 13, 1989) (Boston police officers); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare material); *Taylor* v. *O'Grady*, No. 88-1783 (7th Cir. Nov. 1, 1989) (correctional officers who have regular contact with prisoners); *Rushton* v. *Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees).

Except for *Rushton*, which was cited favorably in *Skinner*, 109 S. Ct. at 1419, each of these decisions was issued after this Court's rulings in *Von Raab* and *Skinner*. In each of them, the court of appeals, like this Court in *Von Raab* and *Skinner*, examined the balance between individual interests in privacy and governmental interests in detecting and deterring drug use in the context of the particular program at issue. While some of the decisions noted that the random aspect of a testing program is a factor to be considered in that balance, the courts have also agreed that random testing does not call for a legal standard different from that applied in this Court's cases. The court of appeals' decision in this case is representative. The court observed that the random nature of the Department of Justice testing program is a relevant consideration that could "tip the scales" in a close case. But the court also made clear that that feature of the program did not require the court "to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*." Pet. App. 12a.

As the court of appeals noted (Pet. App. 12a), the reasoning of *Von Raab* and *Skinner* does not justify

the sharp distinction that petitioners would draw between programs that provide for random testing of persons holding sensitive positions and programs that prescribe so-called "gateway" testing (Pet. 6) of all applicants for such positions. The Court's observation in a footnote in *Von Raab* that under the program at issue there "applicants know at the outset that a drug test is a requirement of" employment–mentioned as one of several factors that "minimize the intrusiveness of the [Customs] Service's drug screening program," 109 S. Ct. at 1394 n.2–does not justify a fundamentally more demanding standard for random testing programs than for those of the type that this Court considered. Indeed, if the government has a compelling interest in detecting and deterring drug use by persons holding certain sensitive positions, that interest is as compelling with respect to incumbents as it is to applicants. The court of appeals' adherence to the balancing approach that this Court recognized last Term was thus not an unwarranted "extension" of the Court's cases. Rather, as the courts of appeals have uniformly recognized, petitioners' position would unduly and artificially limit those decisions.

This Court's traffic stop cases also provide no support for petitioners' position. See Pet. 13-14 n.8. The two decisive shortcomings in the discretionary license checks that were held unconstitutional in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), are not present in the program at issue here. First, the Court noted that "every vehicle on the roads" was subject to seizure "at the unbridled discretion of law enforcement officials," and thus that there was a "'grave danger' of

abuse of discretion." 440 U.S. at 661, 662.[6] By contrast, the OBD program reserves *no* discretion to agency officials as to who will be tested.[7] Second, the discretionary license checks in *Delaware* v. *Prouse* entailed "signalling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority." 440 U.S. at 657. Here, by contrast, the OBD Plan provides for advance notice of random testing,[8] thereby mitigating any tendency of

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[6] See also *Colorado* v. *Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring).

[7] The OBD program is subject to guidelines issued by the Office of Personnel Management that state that "[a]gencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular employees." Federal Personnel Manual Letter 792-19, 54 Fed. Reg. 47,324, 47,330 (Nov. 13, 1989). Once positions are designated for random testing, the OPM Guidelines suggest various methods of random selection: "their names or social security numbers may be selected randomly by computer, they may be selected according to their birth dates, or they may be selected by the first letter in their surnames." *Ibid.* Alternatively, the head of the agency may decide that all employees in the positions designated for testing shall be tested. *Ibid.*

Moreover, the procedures that must be followed in administering the drug tests are prescribed in detail by HHS Guidelines–an additional protection against abuse or harassment. See Pet. App. 140a-146a.

[8] Executive Order No. 12,564 requires agencies, including the Department of Justice, to give their employees 60 days notice before a drug testing program is implemented. 51 Fed. Reg. 32,889 (1986); Pet. App. 64a. In addition, employees who are subject to random testing must receive another notice, no less than 30 days before testing begins. Federal Personnel Manual Letter 792-19, Section 4.b., 54 Fed. Reg. 47,324, 47,331 (Nov.

the program to engender "concern or even fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and employees are informed discretely that they are to be tested. This combination of advance publicity and discrete testing provides "visible evidence, reassuring to law-abiding" employees, that the random tests "are duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. at 559.

Indeed, in *Delaware* v. *Prouse*, 440 U.S. at 663, the Court took care to emphasize that its decision would not prohibit States from designing "methods for spot checks * * * that do not involve the unconstrained exercise of discretion," and the Court held only that motorists could not "have their travel and privacy interfered with at the *unbridled discretion of police officers*" (emphasis added). See also *id.* at 663-664 (Blackmun, J., concurring) (noting that the result would have been quite different in a case involving "purely random stops (such as every 10th car to pass a given point)"). The OBD program does not involve "the unconstrained exercise of discretion," and is thus not suspect under the reasoning of *Delaware* v. *Prouse*, *supra*.

13, 1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different than that contemplated by the random checkpoint stops to which the Court referred with approval in *Delaware* v. *Prouse*, 440 U.S. at 663.

For all the above reasons, random drug testing under the OBD Plan is not fundamentally more intrusive than the applicant drug testing upheld in *Von Raab*. Even if it were, the additional intrusion would be matched by the increased effectiveness of a plan that extends to incumbents holding positions as well as applicants for those positions. See *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989).

2. The court of appeals correctly applied this Court's balancing test to the category of employees at issue here. The OBD Plan's provision for testing of employees holding top secret security clearances plainly serves the government's critical interest in protecting national secrets to a degree outweighing the privacy interests of those employees. In *Von Raab*, this Court "readily agree[d] that the Government has a compelling interest in protecting truly sensitive information from those who, 'under compulsion of circumstances or for other reasons, . . . might compromise [such] information.'" 109 S. Ct. at 1396. And in other contexts, this Court has recognized that "the Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980). Accord *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875).

The OBD plan advances that interest by making it less likely that national secrets of "the highest order of confidentiality" (Pet. App. 17a n.11) will be placed in the hands of individuals who are susceptible to breach-

es of security resulting from lapses in judgment, financial pressure, blackmail, or other problems associated with illegal drug use. See *Von Raab*, 109 S. Ct. at 1395, 1396. The government's interest in protecting highly-classified secrets is just as applicable to employees who currently possess clearances as it is to candidates for clearances who could be tested under petitioners' "gateway" theory. Even in the absence of evidence of pervasive drug use, the Department is not required to assume that its workplace is "immune from this pervasive social problem," and it may act to deter drug use as well as to detect drug users. *Id.* at 1394-1395; compare Pet. 20-23.[9]

Petitioners argue, nevertheless, that the decision in this case conflicts with the reasoning underlying the limited remand in *Von Raab*. Pet. 16-23. The court of appeals correctly rejected that assertion. See Pet. App. 17a-19a. In *Von Raab*, while the Court recognized the government's compelling interest in protecting "truly sensitive information," it remanded because the record left room for doubt as to whether the category of employees to be tested under this rubric had been

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[9] These legitimate bases for the OBD Plan lose none of their force by virtue of the fact that the Plan was adopted in response to an executive order. See Pet. 13. Executive Order No. 12,564, while requiring each agency "to test for the use of illegal drugs by employees in sensitive positions," left to the head of each agency the judgment regarding "[t]he extent to which such employees are tested and the criteria for such testing" and required consideration of "the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position." Pet. App. 63a-64a.

defined "more broadly than necessary to meet the purposes of" the Customs Service's testing program. 109 S. Ct. at 1397. Significantly, the Court did not hold that the program at issue in *Von Raab* was unconstitutional, and, in any event, the characteristics of the program at issue here permit a determination of its legality on the present record.

First, the OBD Plan is applicable only to employees who are cleared to receive "top secret" information. That category of classified information is of "the highest order of confidentiality;" it consists of "information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Pet. App. 17a n.11 (quoting 47 Fed. Reg. 14,874 (1982)). The court of appeals was thus fully justified in its observation that "[w]hatever 'truly sensitive' information includes, * * * it encompasses top secret national security information." Pet. App. 17a. While petitioners suggest that the court of appeals should have gone further and inquired whether employees subject to testing were likely to encounter "*Egan*-type national security information" (Pet. 19), nothing in *Von Raab* requires or permits a court to carve out a category of secrets narrower than those classified top secret whose protection justifies drug testing.

Second, whereas this Court found that the record in *Von Raab* did not foreclose the possibility that the Customs Service's program extended to employees who had little likelihood of actually obtaining access to sensitive information, regulations strictly restrict the availability of top secret security clearances and thus limit the category of employees who are subject to testing. Under the Department's regulations, a top

secret clearance is available only upon a showing that the individual has a "demonstrable need for access to classified information" (28 C.F.R. 17.95(a))–and thus presumably a reasonable likelihood of obtaining it.[10] Further, even to the extent that employees' access to information is uncertain, the court of appeals correctly noted that "[t]he whole point of granting top secret security clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." Pet. App. 18a.

Third, Justice Department employees entrusted with the government's most closely-held secrets have a diminished expectation of privacy with respect to inquiries into matters, such as illegal drug use, that could enhance the risk of security breaches. The grant of a top secret clearance is contingent upon a comprehensive background investigation that includes inquiries to the individual and acquaintances regarding

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[10] Under the Department's regulations, top secret security clearances are not available to persons who have a "mere possibility of access to truly sensitive information" (Pet. 18). All requests for security clearances must "contain a demonstrable need for access to classified information" and "the number of persons cleared and granted access to classified information shall be maintained at the minimum number that is consistent with operational requirements and needs." 28 C.F.R. 17.95(a). Further, the heads of Departmental divisions and offices are required to request the withdrawal of security clearances for "persons for whom there is no foreseeable need for access to classified information or material in connection with the performance of their official duties." 28 C.F.R. 17.98(d). Thus, if petitioners or others in the Department hold security clearances that are unnecessary, their proper course is to relinquish the clearances.

drug use. In *Von Raab*, 109 S. Ct. at 1397, the Court noted that background investigations are among the measures "that may be expected to diminish * * * expectations of privacy in respect of a urinalysis test." Further, as holders of security clearances know, executive officials have very broad discretion to establish and modify the criteria that determine who will be entrusted with classified information, and the expectations of privacy of those who hold top secret security clearances are correspondingly qualified.[11]

These circumstances, among others, foreclose any uncertainty of the type that led to the remand in *Von Raab*. They also fully support a conclusion that the OBD Plan is constitutional with respect to employees with top security clearances.

3. Consistent with their view that the decisions in *Skinner* and *Von Raab* "turned on limited circumstances" of those cases (Pet. 10), petitioners argue that the court of appeals paid too little heed to factual distinctions that they perceive between those cases and this one. See Pet. 18-23. However, the court of appeals correctly refused to engage in a point-by-point comparison of the facts of this case and those that this Court decided. See Pet. App. 8a-10a. Rather, it applied the "general principles" (*id.* at 8a) that this Court outlined just last Term and weighed the government's interest in protecting top secret information and the intrusiveness of the

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[11] In view of the importance of national security and the sensitivity involved in granting access to national security information, the decision whether to grant a security clearance to an Executive Branch employee–an "inherently discretionary judgment call"–has been committed to agency discretion by law. *Department of the Navy* v. *Egan*, 108 S. Ct. 818, 824 (1988).

OBD Plan within the framework this Court had prescribed. Petitioners' various assertions that the court of appeals misapplied that framework to the particular facts of this case and undervalued petitioners' concerns do not raise questions calling for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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